United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-2104/2231

United States Court of Appeals
FOR THE SECOND CIRCUIT

BETTY LEVIN et al.,
Plaintiffs-Appellees,

against

MISSISSIPPI RIVER CORPORATION et al.,
Defendants-Appellees,

JACOB R. COHEN, JUNE COHEN and NAPOLEON C. GABRIEL,
Objectors-Appellants.

BRIEF FOR PLAINTIFFS-APPELLEES BETTY LEVIN AND ROBERT LeVASSEUR ON APPEAL FROM FEE ALLOWANCES

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BRIEF FOR PLAINTIFFS-APPELLEES
BETTY LEVIN AND ROBERT LeVASSEUR
ON APPEAL FROM FEE ALLOWANCES.

In this stockholders' class and derivative action, three objectors (Jacob R. Cohen, June Cohen, Napoleon C. Gabriel) appeal from an order of the Southern District of New York, Weinfeld, J., awarding to plaintiffs-appellees legal fees and expenses aggregating about $2,600,000.* The fee decision below is reported, Levin v. Mississippi River

*This includes $850,000 awarded to plaintiff Alleghany Corporation, which is submitting a separate brief.

Corp., 377 F. Supp. 926 (S.D.N.Y. 1974). The fee award followed the Court's approval of the settlement of this action, Levin v. Mississippi River Corp., 59 F.R.D. 353 (S.D.N.Y. 1973), affirmed on opinion below sub nom. Wesson v. Mississippi River Corp., 486 F. 2d 1398 (2d Cir. 1973), cert. denied sub nom. Wesson v. Levin, 414 U.S. 1112 (1973), rehearing denied, 415 U.S. 939 (1974).

Under the settlement terms, the filing of the appeals has suspended the payment of the allowances without security and without interest. At plaintiffs' request, the appeals are heard on an expedited schedule (order of September 18, 1974).

Two additional appeals (No. 74-2172 and 74-2231), by objectors Michael Moumousis and Napoleon C. Gabriel, seek review of orders below denying their motions to vacate or modify the approval of the settlement. These appeals are being briefed separately.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Did the District Court properly require defendant Missouri Pacific to pay half of the fee allowance, as required by the settlement heretofore approved by this Court and since then consummated?

2. Did the District Court abuse its discretion in the award of fees by taking into account the services of plaintiffs' counsel in an earlier related action, which the Court found to have been "the basis and hard core of this litigation"?

3. Is the fee award premature?

STATEMENT OF THE CASE

The decisions below (59 F.R.D. 353; 377 F. Supp. 926) narrate the facts in detail. The following statement is, therefore, confined to the more salient facts here relevant.*

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*Appellants filed their Appendices without first serving the designation required by Rule 30(b) FRAP. Since these Appendices were unsatisfactory, appellees have applied for leave to submit a Joint Appendix of their own. Unless otherwise indicated, parenthetical citations herein refer to pages of the Joint Appendix.

Capitalization of
Missouri Pacific

In 1956 defendant Missouri Pacific Railroad Company ("MoPac") emerged from reorganization with two classes of stock: Class A, about 1,900,000 shares, was in the nature of preferred stock; Class B, about 40,000 shares, was in the nature of common stock. Each share of either class was entitled to one vote. The Class A, commanding 98% of the votes, was therefore in control of MoPac, whereas the Class B was entitled to MoPac's substantial equity.

Plaintiff Alleghany Corporation ("Alleghany") owned more than half of the Class B stock. Since 1963, defendant Mississippi Piver Corporation ("Mississippi" or "MRC") has held a majority of the A stock and, with it, control of MoPac.

The voting rights litigation.

In December 1963 MoPac announced a plan to merge or consolidate with one of its subsidiaries. The plan was to be the vehicle for eliminating the Class B, reducing its

interest in MoPac's residual assets and earnings from 100% to 2%, and thus depriving it of more than $200 million of MoPac's then net assets. What the Class B would have lost, the Class A (principally Mississippi) would have gained. MoPac announced that the plan would be submitted to its stockholders for approval by a collective vote, not a class vote.

Class B stockholders, including Alleghany and Betty Levin, represented by substantially the same lawyers appearing in the present action, promptly brought suit in the Missouri federal court to enjoin the plan. After more than three years they finally prevailed; Levin v. Mississippi River F. Corp., 386 U.S. 162 (1967), held that the Class B holders were entitled to cast a separate class vote on the plan. Since the Class B opposed the plan, it had to be abandoned. The Supreme Court's decision established that the Class B had a veto right over any merger or similar transaction of MoPac.

The successful lawyers applied for an allowance of their fees and expenses against MoPac. The District Court granted an allowance, but the Eighth Circuit reversed on the

ground that MoPac, as distinguished from the Class B stockholders, had derived no benefit from the litigation. Missouri Pac. R. Co. v. Slayton, 407 F. 2d 1078 (8th Cir.), cert. denied, 395 U.S. 937 (1969), rehearing denied, 397 U.S. 1081 (1970).

The present dividend action and its settlement.

A few months after the Supreme Court's voting rights decision, Betty Levin brought the present action in December 1967, mainly to compel the payment of greater dividends on the Class B shares; she also alleged derivative claims. Alleghany and another Class B stockholder, Robert LeVasseur, intervened as additional plaintiffs. The defendants were MoPac, three of its directors and Mississippi. The action was declared to be maintainable as a class suit under subdivisions (b)(1) and (b)(2) of Rule 23 FRCP (174-178).

After extensive litigation, the parties agreed, subject to Court approval, to settle the action by a recapitalization of MoPac (202-241). Among other things, each of the 39,731 Class B shares was to be exchanged for 16 new common shares of MoPac plus $850 cash. The $5

dividend on the old B stock would thus be replaced by $80 of dividends on the new common. Mississippi was to make a tender offer for 400,000 of the new common shares at $100 a share. The recapitalization was to depend on stockholder and ICC approval, including separate votes by the Class A and Class B stockholders other than Mississippi and Alleghany.

The "Stipulation of Settlement" and the "Settlement Agreement" (202-241) provided that, after final judgment of approval was no longer subject to appeal, plaintiffs or their counsel would apply for the allowance of counsel fees and expenses. Any allowances were to be paid by MoPac and Mississippi. The application of counsel for plaintiffs Levin and LeVasseur would include their services in the Missouri voting rights litigation; MoPac and Mississippi reserved the right to oppose such inclusion. We quote from the Stipulation and the Agreement (206-07, 233):

> "8. After the entry of a final judgment approving the terms of the settlement contained herein, and after said judgment is no longer subject to appeal, counsel for plaintiffs Levin and LeVasseur will apply to the Court for allowances of attorneys' fees and expenses in connection with this litigation, including the litigation in Missouri culminating in Levin v. Mississippi River Fuel Corp., et al., and Alleghany Corporation, et al. v. Mississippi River Fuel Corp.,

et al., 386 U.S. 162 (1967). Plaintiff Alleghany will apply to the Court at such time for reimbursement of attorneys' fees and expenses actually incurred by it in this action as provided in Section 7.10 of the Settlement Agreement. MoPac and MRC have indicated that they will not oppose the granting of allowances which in their judgment are reasonable, which indication is made without prejudice to their position on any application based upon the Missouri litigation described above which they may choose to oppose. Any allowances awarded and not subject to a further appeal shall be paid by MoPac and MRC." (Settlement Stipulation)

"7.10 Fees of Counsel. After the entry of a final judgment by the Court approving the terms of settlement contained herein, and after such final judgment is no longer subject to appeal, Plaintiffs and/or counsel will apply to the Court for allowances of fees and expenses, including fees and disbursements of attorneys, accountants and experts; and Defendants will not oppose the granting of such allowances as in their judgment are reasonable. Any such allowances shall be paid by MoPac and MRC." (Settlement Agreement)

The settlement hearing and the approval and consummation of the settlement.

The District Court directed a hearing on the propriety and fairness of the settlement; all MoPac stockholders, Class A and Class B, received notice (Docs. 156, 157). The Cohens, as holders of Class A stock, filed objections (242-244), which included the following:

"B. 7.10 of the settlement agreement provides that attorney fees will be paid by the Missouri Pacific Railroad Company and the Mississippi River Corporation. However, it does not indicate how much of the fees will be paid by the Missouri Pacific Railroad Company nor the basis for arriving at the amount.

* * *

"3. It is the position of these objectors that no payment of fees or expenses may be made by the Missouri Pacific Railroad in excess of amounts incurred by plaintiffs which bear a direct relationship to pecuniary benefits, if any, derived by the Missouri Pacific Railroad from this lawsuit, are related to the allegations of the complaints, and were not necessitated by the conduct of the Mississippi River Corporation or the individual defendants described in the complaints. The settlement agreement should so provide."

After a full hearing (245-366), Judge Weinfeld approved the settlement (59 F.R.D. 353). In summarizing its terms, he referred specifically to the provision that "fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi" (59 F.R.D. at 361). He approved that provision, noting that the fees were "to be paid equally by Mississippi and MoPac" and that the amounts of any allowances would be subject to a separate hearing on notice to all interested parties (59 F.R.D. at 373).

Although Judge Weinfeld thus overruled the

objections of the Cohens, they did not seek review of his decision. Nor did appellant Gabriel, though his attorney, Gerard M. Carey, Esq., brought an appeal on behalf of one William R. Wesson, a Class B stockholder. This Court affirmed the approval of the settlement upon Judge Weinfeld's opinion (401; 486 F. 2d 1398), and the Supreme Court denied Wesson's applications for certiorari and rehearing (414 U.S. 1112; 415 U.S. 939).

Following this Court's decision, the MoPac stockholders, by appropriate class votes, overwhelmingly approved the recapitalization. The ICC likewise approved (420-501). On January 24, 1974, the settlement was fully consummated; the Class B stockholders received nearly one hundred million dollars worth of cash and securities without any deduction for legal fees and expenses, since those were to be separately paid by MoPac and Mississippi.

The fee award.

With the denial of certiorari and rehearing, the time set for fee applications had arrived (pp.7-8, above). Judge Weinfeld directed a hearing upon notice to all interested

parties.

The fee applications (90-145) were lengthy and detailed. They set forth the nature of the services performed by each attorney, the time spent, the standing of counsel on both sides, the magnitude and complexity of the litigation, the results obtained, the benefits conferred on the Class B stockholders, the public benefits and the nature of the risk undertaken by counsel under a contingent fee arrangement, all in accordance with the decision of this Court in City of Detroit v. Grinnell Corp., 495 F. 2d 448 (2d Cir. 1974).

At the fee hearing of March 26, 1974, four of plaintiffs' counsel testified and were cross-examined by the objectors, again in accordance with the Grinnell case, supra. The appellants have not included the hearing transcript in the record on appeal and do not challenge the adequacy of the evidence adduced at the hearing. MoPac and Mississippi did not object to the award of fees and expenses to the Levin-LeVasseur attorneys, provided that fees did not exceed $2,000,000 and expenses $30,000. Contrary to the assertion of the Cohens, MoPac and Mississippi took a neutral

position on all issues of fact and law, including compensation for services in the voting rights litigation.

Judge Weinfeld (165-173) awarded $1,750,000 in fees plus $22,422.06 in expenses to the Levin-LeVasseur attorneys. He also granted Alleghany's application for reimbursement in the sum of $850,000. In his opinion, Judge Weinfeld referred to the objections of the present appellants (377 F. Supp. at 928):

> "Upon the return date of the hearing of these applications, five shareholders objected to the payment of the fees as requested, but generally their views reflected continuing objection to the settlement. Two of them, owners of Class A stock, opposed payment of fees by MoPac on the ground that only the Class B stockholders or other allied interests should be assessed the costs of the litigation. The court finds that the objections raised are without substance."

This is the decision from which the present appeals are taken.

ARGUMENT

The appeals from the District Court's allowance of fees and expenses raise three narrow legal questions. The

Cohens contend that no fees at all should be paid by MoPac. The Cohens and Gabriel assert that the allowance to these petitioners should not include their services in the voting rights litigation. Gabriel claims that the fee award is premature. None of the appellants contends that the awards are in any other respect improper or excessive.

We have, therefore, no occasion to discuss the vigorous and unremitting prosecution of this litigation over a period of ten years; the enormous interests at stake; the threat to the very existence of the Class B stock, first through MoPac's merger plan of 1963 and, after that plan was defeated, through the systematic withholding of any but nominal dividends on the B stock; the difficulties encountered in the litigation and the novel and intricate problems involved, as evidenced in part by the long line of reported decisions of two District Courts, two Courts of Appeals and the United States Supreme Court;* the determined

*Slayton v. Missouri Pac. R. Co., 233 F. Supp. 747 (E.D. Mo. 1964); reversed:

Mississippi River Fuel Corp. v. Slayton, 359 F. 2d 106 (8th Cir. 1966); reversed:

(Footnote continued on following page)

and resourceful opposition we encountered from distinguished counsel, including some of the leading law firms of the land; our broad experience in this type of litigation and our thorough knowledge of MoPac and its relevant history; the contingent nature of our compensation and the staggering

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(Continuation of footnote from previous page)

Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (1967);

Slayton v. Missouri Pac. R. Co., 279 F. Supp. 525 (E.D. Mo. 1968); reversed:

Missouri Pac. R. Co. v. Slayton, 407 F. 2d 1078 (8th Cir.), cert. denied, 395 U.S. 937 (1969), rehearing denied, 397 U.S. 1081 (1970);

Levin v. Mississippi R. Corp., 289 F. Supp. 353 (S.D.N.Y. 1968);

Levin v. Mississippi R. Corp., 47 F.R.D. 294 (S.D.N.Y. 1969);

Levin v. Mississippi R. Corp., 59 F.R.D. 353 (S.D.N.Y. 1973), affirmed on opinion below sub nom.:

Wesson v. Mississippi R. Corp., 486 F. 2d 1398 (2d Cir.), cert. denied, 414 U.S. 1112 (1973), rehearing denied, 415 U.S. 939 (1974).

A number of additional decisions in the litigation are unreported.

risk we took of going empty-handed if we failed; and, finally, the huge benefits we acnieved by a settlement that was commended by Judge Weinfeld (in an opinion adopted by this Court) and that was approved by the ICC and by overwhelming majorities of the Class A and Class B stock-holders.

These matters have been set forth in our fee petition and have been reviewed by Judge Weinfeld. The present appeals do not question his findings or the adequacy of the hearings. The following discussion is, therefore, confined to the three specific questions of law raised by appellants.

I.

THE DISTRICT COURT PROPERLY ASSESSED ONE-HALF OF PLAINTIFFS' ALLOWANCES AGAINST DEFENDANT MoPAC.

The major thrust of the Cohens' appeal asserts (Br. 10, 14 et passim) that MoPac should not pay any part of plaintiffs' fees because "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor; " Fleischmann v. Maier Brewing Co., 386 U.S. 714, 717 (1967). The argument is puzzling, to say the least, for here we do have an explicit contract requiring MoPac, along with Mississippi, to pay any allowances to plaintiffs. The Settlement Stipulation (202-241) provides (par. 8):

> "Any allowances awarded and not subject to a further appeal shall be paid by MoPac and MRC [Mississippi]."

The Settlement Agreement similarly provides (par.7.10):

> "Any such allowances [to plaintiffs and/or counsel] shall be paid by MoPac and MRC."

Since the Cohens are, of course, aware of these provisions but studiously avoid any reference to them, their

arguments have a somewhat Delphic cast. We shall try as best we can to divine their meaning.

1. The Cohens seem to say that the benefits of this action accrued mainly to the Class B stockholders (Br. 19,21); accordingly, the Class B rather than MoPac should pay plaintiffs' legal fees. Whether or not that would be true in the absence of a contract provision, here the fee burden of the Class B was expressly assumed by MoPac and Mississippi.

According to the Cohens (Br.15), "the settlement agreement cannot be construed to provide for the payment by the corporate defendants of all the Class B stockholders' legal fees". The Settlement Stipulation, however, does provide, broadly and in plain English, that MoPac and Mississippi will pay "any allowances awarded" (emphasis added). That certainly includes allowances based upon the benefits received by the Class B. Any other interpretation would stultify the settlement agreement. If, as the Cohens say, the principal settlement benefits accrued to the Class B, it is inconceivable that the settlement agreement intended the services producing those benefits to go uncompensated.

2. An alternative argument of the Cohens seems to suggest that MoPac's agreement to assume the payment of plaintiffs' fees is improper and invalid. The contention comes too late. It goes to the validity of the Settlement Stipulation, of which the assumption clause is part. The validity of the settlement was sustained when this Court and the District Court approved it.

Indeed, the Cohens' objections to the settlement expressly challenged the validity of the assumption clause (pp. 8-9 ,above). The District Court, in approving the settlement, overruled the objections, and the Cohens did not seek review. Their attempt now to mount a second and collateral attack on the validity of the settlement is barred by res judicata and collateral estoppel. Zdanok v. Glidden Co., 327 F. 2d 944 (2d Cir.), cert.denied, 377 U.S. 934 (1964); Bee Machine Co. v. Freeman, 131 F. 2d 190 (1st Cir. 1942), aff'd, 319 U.S. 448 (1943).

3. In addition, the parties have changed their positions in reliance on the terms of the settlement. The Class B stockholders have received the full benefits of MoPac's recapitalization free of any litigation fees and expenses.

This was possible only because MoPac and Mississippi assumed the payment of those fees and expenses. MoPac itself and its Class A stockholders, including the Cohens, likewise received great benefits from the consummation of the settlement, for it eliminated the festering conflict of interests between the two classes of MoPac's stockholders (see 59 F.R.D. at 362, 366; 377 F. Supp. at 929). Having accepted that benefit, they are estopped from disputing MoPac's duty to pay part of the price in the form of the fee allowances.

4. Even apart from res judicata and estoppel, the Cohens' objections to the validity of the assumption clause are untenable. Their reliance on City of Philadelphia v. Chas Pfizer & Co., 345 F. Supp. 454, 469-471 (S.D.N.Y. 1972), is misplaced; for while Judge Wyatt there criticized the assumption by the defendants of plaintiffs' counsel fees as possibly breeding a conflict of interest, he nevertheless sustained the validity of the assumption and enforced it (p. 471):

> "Under all the circumstances, however, there seems no reason to nullify the Kohn fee agreement. There was no secrecy. The agreement was disclosed to the Court and to other counsel. Payment by defendants will not diminish any recovery by any class member. To relieve defendants of their obligations to pay Kohn would simply give to defendants an undeserved windfall. The agreement will be enforced."

Other courts, it may be added, do not share Judge Wyatt's doubts, but treat a fee assumption agreement such as that at bar as valid and even desirable. Glicken v. Bradford, 35 F.R.D. 144, 150, 158 (S.D.N.Y. 1964); see Young v. Katz, 447 F. 2d 431, 434 (5th Cir. 1971); Rome v. Archer, 41 Del. Ch. 404, 197 A. 2d 49, 57 (Sup. Ct. 1964); Blumenthal v. Roosevelt Hotel, Inc., 116 N.Y.S. 2d 94, 96 (Sup. Ct. 1952).

In the present case, valid reasons dictated the assumption. The settlement depended on the stockholders' approval of the MoPac recapitalization. The Class B stockholders were to receive $850 cash and 16 shares of new common; if these amounts had been subject to an assessment for legal fees and expenses, the Class B shareholders would not have known what they would receive from the recapitalization on which they were to vote.

Moreover, the danger of a conflict of interests apprehended by Judge Wyatt in City of Philadelphia, supra, did not exist here. At the time of the settlement, Alleghany owned 21,243 Class B shares, about 53% of the total outstanding. With the settlement evaluated at $2,450 for each Class B share (59 F.R.D. at 368), Alleghany's interest in the settlement was more than $52 million. Such being the magnitude of Alleghany's

stake, it would be simply absurd to suggest that Alleghany might have consented to a "cheap" settlement just to secure a greater fee allowance for these applicants.

We submit that the agreement by MoPac and Mississippi to pay the fee allowances is not open to attack at this stage of the litigation and is, in any event, clearly proper and valid.

5. Most of the Cohens' remaining contentions (Points II - VIII of their brief) are variations on the same theme. In one form or another it is argued that MoPac derived no benefit from plaintiffs' services. Even if that were true,* it would be immaterial; for there is no dispute that plaintiffs' services did produce great benefits for the Class B (Cohen Br. 19, 21). Plaintiffs are certainly entitled to be paid for the services that brought about those benefits; and MoPac, along with Mississippi, has agreed to make that payment.

The Cohens argue specifically (Br. 26-27) that plaintiffs' services relating to the derivative counts were not compensable, but that assumes, contrary to fact, that the

*The Court below did find substantial benefits to MoPac (59 F.R.D. at 362, 366; 377 F. Supp. at 928).

derivative and representative services were separable. The charge that the derivative claims had no "merit" is simply fanciful. Even the Cohens do not dispute that those claims were legally sufficient, and that is enough to support a fee award, Kahan v. Rosenstiel, 424 F. 2d 161, 167 (3d Cir.), cert. denied sub nom. Glen Alden Corp. v. Kahan, 398 U.S. 950 (1970).* Judge Weinfeld's "cautious prophecy" as to the probability of plaintiffs' ultimate success applied equally to the representative and derivative claims (59 F.R.D. at 366).

6. The Cohens complain (Br. 31-34) that the imposition of the fee allowances on MoPac and Mississippi in equal shares was improper because the settlement agreement does not use the word "equally". We are not told what a proper rate of allocation would have been.

Under the strict terms of the settlement, which required any allowances to "be paid by MoPac and MRC", the two companies' liability might have been held to be joint and several, so that MoPac would have been liable for the full amount of the allowances rather than just one-half; 4 Corbin on Contracts (1951), § 928, p. 715. However, Judge Weinfeld, in

*In the Second Circuit fee awards have never been held to depend on the "merit" of the underlying claim.

approving the settlement, ruled that the allowances were "to be paid equally by Mississippi and MoPac" (59 F.R.D. at 373). No one objected to or appealed from this ruling. As between MoPac and Mississippi, the ruling accorded with the familiar principle that, in the absence of a contrary agreement, "persons assuming a common burden shall share it equally"; Capodilupo v. McCormack, 315 F. Supp. 526, 529 (D.Mass.1970), citing Quintin v. Magnant, 285 Mass. 450, 452, 189 N.E. 209, 210 (1934).

We submit, therefore, that the District Court properly assessed one-half of the plaintiffs' allowances against defendant MoPac.

II.

IN AWARDING FEES TO COUNSEL FOR PLAINTIFFS LEVIN AND LeVASSEUR, THE DISTRICT COURT PROPERLY GAVE CONSIDERATION TO THE SERVICES THEY RENDERED TO THE CLASS B IN THE MISSOURI VOTING RIGHTS LITIGATION

Judge Weinfeld held that the services rendered by these petitioners in the voting rights litigation are compensable in this action (377 F. Supp. at 931-932). The Cohens concede (Br. 30) that "the allowance in a derivative or class

suit may include services rendered in a different proceeding and a different forum, provided that they are sufficiently related to the ultimate recovery." They contend, however, that the services of these petitioners in the voting rights litigation are not so related to the recovery herein.

1. The voting rights litigation (p. 4 , above; 59 F.R.D. at 358-59) arose from MoPac's 1963 plan to merge or consolidate with one of its subsidiaries into a new corporation. Under the merger terms, the Class B stock would have been eliminated and replaced by 2% of the common stock of the new corporation; MoPac's Class A stockholders would have received the remaining 98%. The plan had to be abandoned after the Supreme Court finally recognized the right of the Class B to cast a separate class vote on the plan.

It was thus the voting rights litigation that preserved and, indeed, created the basis for the present action and its settlement. Plaintiffs could bring the present action for greater dividends on the Class B stock only because the voting rights action kept the Class B stock in existence, with the Class B stockholders as the principal owners of MoPac's equity and earnings. The dividend action would have been

impossible if consummation of MoPac's 1963 plan had reduced the Class B to a two percent interest in the earnings and assets of MoPac.

What is more, the Supreme Court's 1969 decision established the strategic position of the Class B by sustaining its right to veto any merger or consolidation which the class might deem detrimental to its interest. This veto power of the Class B was a major reason finally inducing MoPac and Mississippi to settle this action.

The successful prosecution of the voting rights litigation was thus a necessary precondition of the suit at bar and was a producing cause of the settlement. Judge Weinfeld so held (377 F. Supp. at 931):

> "*** the right of the Class B stock to vote separately was the basis and hard core of this litigation. Indeed, the settlement of this action could only have been achieved because of the successful conclusion of the voting rights suits. The effective veto power of the Class B stock obviously was a principal factor in bringing about the settlement."(Footnote omitted)

2. In circumstances such as these, it is thoroughly settled that the allowance in a derivative or class suit may

include services rendered in a different proceeding and a different forum, provided that they are sufficiently related to the ultimate recovery.

Angoff v. Goldfine, 270 F. 2d 185 (1st Cir.1959), is the leading case. Counsel for the plaintiff in a stockholder's action, settled with federal court approval, applied for a fee. Long before that action, the plaintiff and his counsel had brought a mandamus proceeding in a state court to compel the production of corporate books and records. Although the earlier proceeding was finally dismissed, counsel claimed that, under the threat of the disclosure proceeding, but before the commencement of the derivative suit, the defendants had corrected two of their misdeeds to the tune of $230,000 (p.187). In the subsequent derivative suit, counsel sought an allowance for this $230,000 benefit and the services producing it. The First Circuit, upon a thorough legal analysis, sustained the claim because the mandamus proceeding had been "reasonably in aid of the main action" (pp. 190-191).

The Angoff rule applies directly, if not a fortiori, to the case at bar; for the voting rights litigation was not just "reasonably in aid of the main action", but was the

indispensable prerequisite of the present suit. The benefits produced by the mandamus proceeding in Angoff were quite separate and independent from the results achieved in the main action; the present action would have been altogether impossible without the voting rights litigation.

Similar cases abound. Thus, in Honda v. Mitchell, 419 F. 2d 324 (D.C. Cir. 1969), a lawyer was allowed compensation for his earlier services in an administrative proceeding before the Alien Property Custodian, which had contributed to the ultimate success in the litigation. In Paris v. Metropolitan L. Ins. Co., 94 F. Supp. 792 (S.D.N.Y. 1947), the allowance to the successful lawyers for the class plaintiffs included not only their services in the action, but also their earlier efforts before the National War Labor Board, which had been necessary to achieve the ultimate result. In Chapman v. United States, 314 F.Supp. 549, 556 n.7, 561 (C.D. Cal. 1970), the court, relying on Angoff, supra, awarded fees for services rendered in some 30 federal and state actions over a period of 20 years, because all the litigations were interconnected and dependent on each other.

The rule of these cases, we submit, is applicable and clearly renders petitioners' services in the voting rights

litigation compensable here. Indeed, not to take the voting rights services into account in the present fee award would have conferred a windfall on the Class B, who have received the benefit of petitioners' voting rights services. That would be contrary to the teachings of Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970):

> "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense."

Since MoPac and Mississippi assumed the fee obligations of the Class B, it was no abuse of discretion for Judge Weinfeld to take the voting rights services into account in setting the allowances of these petitioners.

3. The successful plaintiffs' lawyers in the voting rights litigation sought a fee award against MoPac, but the Eighth Circuit refused it, Missouri Pac. R.Co. v. Slayton, supra (407 F. 2d 1078). The Court of Appeals recognized that "the Class B stockholders obtained a very substantial benefit from the litigation" (p.1081); but "the right of the named plaintiffs and their attorneys to make a pro rata recovery of fees and expenses against Class B stockholders" was not before the Court (p.1082). Any

benefit to MoPac was held to be only incidental and too insignificant to support an allowance against MoPac (p. 1083).

It is thus plain that the Eighth Circuit's decision was not intended to foreclose petitioners from seeking an allowance against the Class B, and Judge Weinfeld so held (377 F. Supp. at 931). The present action and its settlement supply the jurisdictional and procedural prerequisites for such an award. The new shares and the cash issuable to the Class B stockholders could have been treated as a fund in court, from which fee allowances could have been awarded; but since the settling parties were anxious not to burden the new stock and cash with an indeterminate amount of counsel fees, MoPac and Mississippi assumed the payment of any allowance to which the plaintiffs' lawyers were entitled.

We submit that the District Court's decision on the subject was clearly right.

III.

THE FEE AWARD WAS NOT PREMATURE.

The Settlement Agreement (par. 7.10) expressly prescribed the time at which petitions for the allowance of

fees and expenses were to be filed (p. 8 ,above):

> "After the entry of a final judgment by the Court approving the terms of settlement contained herein, and after such final judgment is no longer subject to appeal, Plaintiffs and/or counsel will apply to the Court for allowances of fees and expenses***."

The final judgment approving the terms of the settlement was entered on May 2,1973 (389 - 391). Upon affirmance by this Court and the denial of certiorari and rehearing by the Supreme Court (the latter on February 19,1974), the judgment was "no longer subject to appeal." The time for allowances had, therefore, arrived.

The motions of Michael Moumousis and Napoleon C. Gabriel to reopen the judgment approving the settlement pursuant to Rule 60(b) FRCP (1 - 22, 68 - 74) did not, of course, have the effect of an appeal. Rule 60(b) expressly provides that "A motion under this subdivision (b) does not affect the finality of the judgment or suspend its operation." Otherwise the steady renewal of 60(b) motions by dissatisfied objectors could prevent allowances forever.

Gabriel states, without support in the record, that four "appeals" from the ICC's approval of the MoPac recapitalization are pending. Presumably he means actions to set aside the ICC order pursuant to 28 USC §§ 2321-2325. The alleged pendency of these actions is immaterial since they are not appeals from the judgment approving the settlement.

CONCLUSION

The judgment awarding legal fees and expenses to plaintiffs and their counsel should in all respects be affirmed.

Dated: October 23,1974

Respectfully, submitted,

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Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BETTY LEVIN et al.,

Plaintiffs-Appellees,

-against-

MISSISSIPPI RIVER CORPORATION et al.,

Defendants-Appellees.

JACOE R. COHEN, JUNE COHEN and
NAPOLEON C. GABRIEL,

Objectors-Appellants.

State of New York,
County of New York,
City of New York—ss.:

Umbertina P. Brown being duly sworn, deposes and says that he is over the age of 18 years. That on the 23rd day of October, 19 74, he served two copies of the Brief for Plaintiffs-Appellees Betty Levin and ~~xxx~~ Robert LeVasseur on Gerard Carey, Esq.

the attorney for the Objector-Appellant, Gabriel by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. 617 Third Street, Brooklyn, N.Y. 11232) ~~N.Y.~~ that being the address designated by h im for that purpose upon the preceding papers in this action.

Umbertina P. Brown

Sworn to before me this
23rd day of October, 1974.

Courtney Brown

COURTNEY BROWN
Notary Public, State of New York
No. 31-5472900
Qualified in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

UMBERTINA P. BROWN being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 49 Rugen Drive, Harrington Park, New Jersey . That on the 23rd day of October, 1974 deponent served the within brief for plaintiffs-appellees Betty Levin and Robert LeVasseur on appeal from fee allowances in this action upon the co-attorney for the objectors-appellants Jacob R. Cohen and June Cohen at the address designated by said attorney for that purpose, by depositing same enclosed in a post-paid properly addressed wrapper marked "Air Mail" in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, as follows:

Michael Paul Cohen, Esq.
7319 North Oakley
Chicago, Illinois 60645

Umbertina P. Brown

Sworn to before me this
23rd day of October, 1974

Courtney J. Brown
Notary Public

COURTNEY J. BROWN
Notary Public, State of New York
Qualified in [illegible] County
Commission Expires March 30, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BETTY LEVIN et al.,

Plaintiffs-Appellees,

-against-

MISSISSIPPI RIVER CORPORATION et al.,

Defendants-Appellees,

JACOB R. COHEN, JUNE COHEN and NAPOLEON C. GABRIEL,

Objectors-Appellants.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN, being duly sworn, deposes and says that he is over the age of 18 years. That on the 23rd day of October, 1974, he served two copies of Brief for Plaintiffs-Appellees Betty Levin and Robert LeVasseur on See Attached List, the attorneys for See Attached List by delivering to and leaving same with a proper person in charge of their office at See Attached List in the Borough of Manhattan, City of New York, between the usual business hours of said day.

Irving Lightman

Sworn to before me this
23rd day of October, 1974

Courtney J. Brown

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Notary Public, State of New York
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